

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 26, 2022

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CELESTE S.,¹

No. 2:21-cv-00039-MKD

Plaintiff,

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

ECF Nos. 15, 17

Defendant.

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 17. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 15, and grants Defendant's motion, ECF No. 17.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. See LCivR 5.2(c).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), superseded on other grounds by 20 C.F.R. §

1 416.920(a). Further, a district court “may not reverse an ALJ’s decision on
2 account of an error that is harmless.” *Id.* An error is harmless “where it is
3 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
4 (quotation and citation omitted). The party appealing the ALJ’s decision generally
5 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
6 396, 409-10 (2009).

7 FIVE-STEP EVALUATION PROCESS

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
14 “of such severity that he is not only unable to do his previous work[,] but cannot,
15 considering his age, education, and work experience, engage in any other kind of
16 substantial gainful work which exists in the national economy.” 42 U.S.C. §
17 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
20 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work

1 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
2 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
3 C.F.R. § 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
7 “any impairment or combination of impairments which significantly limits [his or
8 her] physical or mental ability to do basic work activities,” the analysis proceeds to
9 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
10 this severity threshold, however, the Commissioner must find that the claimant is
11 not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude
14 a person from engaging in substantial gainful activity. 20 C.F.R. §
15 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
16 enumerated impairments, the Commissioner must find the claimant disabled and
17 award benefits. 20 C.F.R. § 416.920(d).

18 If the severity of the claimant’s impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must pause to assess
20 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
-

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
3 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's
5 RFC, the claimant is capable of performing work that he or she has performed in
6 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
7 capable of performing past relevant work, the Commissioner must find that the
8 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
9 performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing other work in the national economy.
12 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
13 must also consider vocational factors such as the claimant's age, education and
14 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
15 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
16 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
17 concludes with a finding that the claimant is disabled and is therefore entitled to
18 benefits. *Id.*

19 The claimant bears the burden of proof at steps one through four above.
20 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to

1 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
2 capable of performing other work; and (2) such work “exists in significant
3 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
4 700 F.3d 386, 389 (9th Cir. 2012).

5 **ALJ’S FINDINGS**

6 On September 26, 2018, Plaintiff applied for Title XVI supplemental
7 security income benefits alleging a disability onset date of June 1, 1997. Tr. 15,
8 60, 170-84. The application was denied initially, and on reconsideration. Tr. 86-
9 89, 93-95. Plaintiff appeared before an administrative law judge (ALJ) on July 22,
10 2020. Tr. 32-59. On August 18, 2020, the ALJ denied Plaintiff’s claim. Tr. 12-
11 30.

12 At step one of the sequential evaluation process, the ALJ found Plaintiff has
13 not engaged in substantial gainful activity since September 26, 2018. Tr. 17. At
14 step two, the ALJ found that Plaintiff has the following severe impairments:
15 anxiety disorder, attention-deficit hyperactivity disorder, alcohol and cannabis
16 abuse, and obesity. *Id.*

17 At step three, the ALJ found Plaintiff does not have an impairment or
18 combination of impairments that meets or medically equals the severity of a listed
19 impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform
20 work at all exertional levels but with the following nonexertional limitations:

[Plaintiff] would be limited to simple, routine, and repetitive tasks with no detailed work; she could not make decision independently but could follow employers' instructions on simple, routine, and repetitive tasks; she could tolerate only occasional changes in work duties; she could have brief superficial contact with the public and co-workers and could not perform collaborative work with co-workers; and she would work best independently.

Tr. 20.

At step four, the ALJ found Plaintiff has no past relevant work. Tr. 24. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, RFC, and testimony from the vocational expert, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, such as cleaner II, hand packager, and cleaner, housekeeping. *Id.* Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the Social Security Act, from the date of the application through the date of the decision. Tr. 25.

On November 25, 2020, the Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff raises the following issues for review:

- 1 1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 2 2. Whether the ALJ properly evaluated the medical opinion evidence.²

3 ECF No. 15 at 10-11.

4 DISCUSSION

5 A. Plaintiff's Symptom Claims

6 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
7 convincing in discrediting her symptom claims. ECF No. 15 at 11-13. An ALJ
8 engages in a two-step analysis to determine whether to discount a claimant's
9 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
10 "First, the ALJ must determine whether there is objective medical evidence of an
11 underlying impairment which could reasonably be expected to produce the pain or
12 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
13 "The claimant is not required to show that [the claimant's] impairment could
14 reasonably be expected to cause the severity of the symptom [the claimant] has
15 alleged; [the claimant] need only show that it could reasonably have caused some
16 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

17 _____

18 ² Plaintiff lists a third issue, however the issue entirely addresses whether the
19 alleged errors raised in the first two issues are harmless and is not an issue in itself.
20 Thus, the Court has addressed the third issue within the other two sections.

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
5 omitted). General findings are insufficient; rather, the ALJ must identify what
6 symptom claims are being discounted and what evidence undermines these claims.

7 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
8 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
9 explain why it discounted claimant’s symptom claims)). “The clear and
10 convincing [evidence] standard is the most demanding required in Social Security
11 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
12 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

13 Factors to be considered in evaluating the intensity, persistence, and limiting
14 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
15 duration, frequency, and intensity of pain or other symptoms; 3) factors that
16 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
17 side effects of any medication an individual takes or has taken to alleviate pain or
18 other symptoms; 5) treatment, other than medication, an individual receives or has
19 received for relief of pain or other symptoms; 6) any measures other than treatment
20 an individual uses or has used to relieve pain or other symptoms; and 7) any other

1 factors concerning an individual's functional limitations and restrictions due to
2 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
3 416.929(c). The ALJ is instructed to "consider all of the evidence in an
4 individual's record," to "determine how symptoms limit ability to perform work-
5 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

6 The ALJ found that Plaintiff's medically determinable impairments could
7 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
8 statements concerning the intensity, persistence, and limiting effects of her
9 symptoms were not entirely consistent with the evidence. Tr. 21.

10 *1. Inconsistent Objective Medical Evidence*

11 The ALJ found Plaintiff's symptom claims were inconsistent with the
12 objective medical evidence. Tr. 21-23. An ALJ may not discredit a claimant's
13 symptom testimony and deny benefits solely because the degree of the symptoms
14 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261
15 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
16 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400
17 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a
18 relevant factor, along with the medical source's information about the claimant's
19 pain or other symptoms, in determining the severity of a claimant's symptoms and
20 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

1 The ALJ found that while there are some documented abnormalities in the
2 record, such as Plaintiff having psychomotor agitation and abnormal speech,
3 Plaintiff's test results and examination findings were largely normal. Tr. 21-22.
4 At Dr. Islam-Zwart's examination, Plaintiff scored 30 out of 30 points on the mini
5 mental status examination, and her Trail Making Test scores were normal on one
6 test, and only mildly impaired on the other. Tr. 22 (citing Tr. 335). At a
7 counseling intake, Plaintiff was noted as clean, alert, attentive, and she had normal
8 mood, orientation, and thought processes, and the provider estimated Plaintiff's
9 intelligence was average, although her attention/concentration were only fair, and
10 her short-term memory was rated as poor. Tr. 22 (citing Tr. 341). Plaintiff
11 reported some anxiety with situational stressors, but reported her anxiety decreased
12 when the stressors resolved. Tr. 23 (citing Tr. 418, 422). Plaintiff continued
13 attending counseling and reported she was making progress toward her goals. Tr.
14 23 (citing Tr. 450). The State agency psychological consultants and the medical
15 expert who testified at the hearing all opined that Plaintiff had no more than
16 moderate limitations. Tr. 23.

17 Plaintiff argues the ALJ erred because Dr. Islam-Zwart's examination
18 documented multiple abnormal findings, along with the normal test scores. ECF
19 No. 15 at 12, ECF No. 18 at 4. However, Plaintiff does not cite to any other
20 objective evidence to support her argument. Despite some abnormal examination

1 findings, Plaintiff had generally normal test scores at Dr. Islam-Zwart's
2 examination. Tr. 23, 335. The ALJ did not address multiple pieces of evidence in
3 the record, such as the special education records; however, Plaintiff only argues
4 that the ALJ failed to consider that she was in special education in English and
5 math. ECF No. 18 at 2. Plaintiff's school records indicate she was in a general
6 education setting 97.86% of the week, and only spent 40 minutes per week in
7 special education services. Tr. 245. Despite Plaintiff's enrollment in special
8 education services, the school records document Plaintiff's generally normal test
9 results. The scores indicate she passed state testing in both math and written
10 language, although she had some difficulties with written language. Tr. 230, 236.
11 Plaintiff had set goals to improve her functional performance, including waiting to
12 join conversations, looking at the person talking, choosing her words wisely, and
13 making appropriate comments during the conversation, and Plaintiff met all of her
14 goals. Tr. 231, 236. Plaintiff also successfully graduated from high school. Tr.
15 365. At a DSHS appointment during which Plaintiff received assistance with her
16 SSI application, Plaintiff was observed as having difficulty with understanding,
17 concentrating, talking, answering, and she had impaired memory and an unpleasant
18 body odor. Tr. 208-09. However, at other appointments, Plaintiff was
19 cooperative, well-groomed, alert, able to articulate with normal speech, and had

20

1 normal mood, affect, attention, and concentration. Tr. 315, 317, 319, 335, 364,
2 380, 401.

3 On this record, the ALJ reasonably found the objective medical evidence is
4 inconsistent with Plaintiff's allegations. This finding is supported by substantial
5 evidence and was a clear and convincing reason, along with the other reasons
6 offered, to discount Plaintiff's symptom complaints.

7 *2. Lack of Treatment*

8 The ALJ found Plaintiff's symptom claims were inconsistent with her lack
9 of treatment. Tr. 22-23. An unexplained, or inadequately explained, failure to
10 seek treatment or follow a prescribed course of treatment may be considered when
11 evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638
12 (9th Cir. 2007). Evidence of a claimant's self-limitation and lack of motivation to
13 seek treatment are appropriate considerations in determining the credibility of a
14 claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-
15 66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, *3 (9th Cir. 2009)
16 (unpublished opinion) (considering why plaintiff was not seeking treatment).
17 When there is no evidence suggesting that the failure to seek or participate in
18 treatment is attributable to a mental impairment rather than a personal preference,
19 it is reasonable for the ALJ to conclude that the level or frequency of treatment is
20 inconsistent with the alleged severity of complaints. *Molina*, 674 F.3d at 1113-14.

1 But when the evidence suggests lack of mental health treatment is partly due to a
2 claimant's mental health condition, it may be inappropriate to consider a
3 claimant's lack of mental health treatment when evaluating the claimant's failure
4 to participate in treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

5 First, the ALJ noted that Plaintiff was uninterested in ongoing treatment for
6 her depressive and anxiety symptoms, and Plaintiff only went to counseling after it
7 was mandated to continue receiving benefits. Tr. 22 (citing Tr. 340, 376). Plaintiff
8 does not offer any argument that she had any reasons for not pursuing mental
9 health treatment. ECF No. 15 at 11-13. Plaintiff has also not taken any
10 medications for her mental health symptoms during the relevant period. Tr. 23.
11 The ALJ's finding that Plaintiff did not seek treatment for her mental health
12 symptom is supported by substantial evidence.

13 Second, the ALJ found that Plaintiff testified that she was not currently on
14 any medication for her ADHD, "despite the fact that the medication was prescribed
15 in the past and helped manage her ADHD symptoms." Tr. 23. However, Plaintiff
16 testified she has never been on medication for her ADHD, because her parents
17 were against her being on medication as a child, and now as an adult she has been
18 worried about having a bad reaction to medication. Tr. 43-44. The medical expert
19 also testified that he did not see evidence in the records that Plaintiff had been on
20 medication for her ADHD. Tr. 43. Plaintiff reported to an examiner and a treating

1 provider that she has never taken psychotropic medication and was not currently
2 on psychiatric medication. Tr. 334, 355. The ALJ stated at the hearing that she
3 saw in the records that Plaintiff was on ADHD medication at some point, and
4 asked what medication Plaintiff took, but Plaintiff testified that she could not
5 remember. Tr. 51-52. At one appointment in 2019, Plaintiff stated she has ADHD
6 and she “use to take medication, but I don’t do that anymore.” Tr. 434. Plaintiff
7 did not state when she took the medication, nor did she state that it improved her
8 ADHD symptoms. *See id.* The ALJ does not cite to any evidence to support the
9 finding that Plaintiff had improvement in her ADHD symptoms with medication.
10 While the medical expert testified Plaintiff had improvement with treatment, and
11 the expert cited to an appointment where Plaintiff was being seen for counseling,
12 but there is no evidence of treatment with psychiatric medication. Tr. 39, 41
13 (citing Tr. 426). The ALJ also does not cite to any evidence that indicates a
14 provider recommended Plaintiff take any psychiatric medications. However, any
15 error in the ALJ’s finding that Plaintiff did not pursue medication for her ADHD
16 despite her prior improvement with medication is harmless, as the ALJ set forth
17 other supported reasons to reject Plaintiff’s symptom claims. *See Molina*, 674 F.3d
18 at 1115.

19

20

1 3. *Secondary Gain*

2 The ALJ found there is evidence Plaintiff is motivated by secondary gain.

3 Tr. 22-23. The tendency to exaggerate provided a permissible reason for
4 discounting Plaintiff's reported symptoms. *Tonapetyan v. Halter*, 242 F.3d 1144,
5 1148 (9th Cir. 2001) (The ALJ appropriately considered Plaintiff's tendency to
6 exaggerate when assessing Plaintiff's credibility, which was shown in a doctor's
7 observation that Plaintiff was uncooperative during cognitive testing but was
8 "much better" when giving reasons for being unable to work.). Moreover, in
9 evaluating symptom claims, the ALJ may utilize ordinary evidence-evaluation
10 techniques, such as considering prior inconsistent statements. *Smolen v. Chater*,
11 80 F.3d 1273, 1284 (9th Cir. 1996).

12 The ALJ noted that Plaintiff was not interested in pursuing treatment for her
13 symptoms. Tr. 22 (citing Tr. 340). After receiving a letter that stated she had to
14 participate in treatment in order to receive cash assistance, Plaintiff began
15 participating in treatment. Tr. 22 (citing Tr. 376). Plaintiff argues the ALJ erred in
16 finding her motivation for seeking treatment was secondary gain, because once she
17 sought counseling, abnormalities were noted during her sessions. ECF No. 15 at
18 12-13. However, the ALJ reasonably considered Plaintiff's lack of treatment until
19 it was mandated, and Plaintiff's motivation for seeking treatment. This was a clear

1 and convincing reason, supported by substantial evidence, to reject Plaintiff's
2 symptom claims.

3 4. *Activities of Daily Living*

4 The ALJ found Plaintiff's symptom claims were inconsistent with Plaintiff's
5 activities of daily living. Tr. 23. The ALJ may consider a claimant's activities that
6 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a
7 substantial part of the day engaged in pursuits involving the performance of
8 exertional or non-exertional functions, the ALJ may find these activities
9 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
10 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to
11 be eligible for benefits, the ALJ may discount a claimant's symptom claims when
12 the claimant reports participation in everyday activities indicating capacities that
13 are transferable to a work setting" or when activities "contradict claims of a totally
14 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

15 The ALJ found Plaintiff's self-reported activities suggest she is more
16 capable than she alleges. Tr. 23. While Plaintiff alleges difficulty socializing, Tr.
17 22, 252, Plaintiff reported that she goes outside daily and spends most of the day
18 outside of the home, she purchases food and gas for friends, so they drive her
19 where she needs to go, and she plays games on a daily basis, Tr. 23, 252-58, 334.
20 Plaintiff reported that she spends time in person with her friends and has a

1 boyfriend, whom she had been in a relationship with for one and a half years at the
2 time of the hearing, and whom she met through a friend. Tr. 18, 49-51, 196, 256,
3 314. Plaintiff also knows how to cook, do laundry, shop for groceries, and manage
4 money, although she does not know how to pay bills. Tr. 18 (citing Tr. 334); Tr.
5 255. Plaintiff reported working with a temporary employment agency, applying
6 for jobs, volunteering, and engaging in odd jobs, including volunteering at an
7 animal shelter and Habitat for Humanity, and volunteering at Friendship Feast for a
8 year. Tr. 19-20, 50, 334, 338.

9 Plaintiff argues her activities are not inconsistent with her claims, because
10 she has not been able to find employment. ECF No. 15 at 11. However, the ALJ
11 reasonably found Plaintiff's activities, including her ability to regularly socialize
12 and volunteer in the community, are inconsistent with her allegations. This finding
13 is supported by substantial evidence and was a clear and convincing reason to
14 discount Plaintiff's symptom complaints. Plaintiff is not entitled to remand on
15 these grounds.

16 **B. Medical Opinion Evidence**

17 Plaintiff contends the ALJ erred in her consideration of the opinion of
18 Kayleen Islam-Zwart, Ph.D. ECF No. 15 at 13-16.

19 As an initial matter, for claims filed on or after March 27, 2017, new
20 regulations apply that change the framework for how an ALJ must evaluate

1 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*
2 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20
3 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give
4 any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*,
5 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §
6 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all
7 medical opinions or prior administrative medical findings from medical sources.
8 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of
9 medical opinions and prior administrative medical findings include supportability,
10 consistency, relationship with the claimant (including length of the treatment,
11 frequency of examinations, purpose of the treatment, extent of the treatment, and
12 the existence of an examination), specialization, and “other factors that tend to
13 support or contradict a medical opinion or prior administrative medical finding”
14 (including, but not limited to, “evidence showing a medical source has familiarity
15 with the other evidence in the claim or an understanding of our disability
16 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-
17 (5).

18 Supportability and consistency are the most important factors, and therefore
19 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
20 416.920c(b)(2). Supportability and consistency are explained in the regulations:

1 (1) *Supportability*. The more relevant the objective medical evidence
2 and supporting explanations presented by a medical source are to
3 support his or her medical opinion(s) or prior administrative
4 medical finding(s), the more persuasive the medical opinions or
5 prior administrative medical finding(s) will be.

6 (2) *Consistency*. The more consistent a medical opinion(s) or prior
7 administrative medical finding(s) is with the evidence from other
8 medical sources and nonmedical sources in the claim, the more
9 persuasive the medical opinion(s) or prior administrative medical
10 finding(s) will be.

11 20 C.F.R. § 416.920c(1)-(2). The ALJ may, but is not required to, explain how the
12 other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when two or
13 more medical opinions or prior administrative findings “about the same issue are
14 both equally well-supported ... and consistent with the record ... but are not exactly
15 the same,” the ALJ is required to explain how “the other most persuasive factors in
16 paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R. § 416.920c(b)(3).

17 The parties disagree over whether Ninth Circuit case law continues to be
18 controlling in light of the amended regulations, specifically whether the “clear and
19 convincing” and “specific and legitimate” standards still apply. ECF No. 15 at 14-
20 16; ECF No. 17 at 10-13. “It remains to be seen whether the new regulations will
 meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ’s
 reasoning and whether the Ninth Circuit will continue to require that an ALJ
 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis
 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.

1 EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,
 2 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3
 3 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer
 4 to the new regulations, even where they conflict with prior judicial precedent,
 5 unless the prior judicial construction ‘follows from the unambiguous terms of the
 6 statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL
 7 3510871, at *3 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet*
 8 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d
 9 Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld
 10 unless ‘they exceeded the Secretary’s authority [or] are arbitrary and
 11 capricious.’”).

12 There is not a consensus among the district courts as to whether the “clear
 13 and convincing” and “specific and legitimate” standards continue to apply. *See*,
 14 *e.g., Kathleen G. v. Comm'r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash.
 15 Nov. 10, 2020) (applying the specific and legitimate standard under the new
 16 regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal.
 17 Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*,
 18 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new
 19 regulations displace the treating physician rule and the new regulations control);
 20 *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D.

1 Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and
2 legitimate nor clear and convincing standard). This Court has held that an ALJ did
3 not err in applying the new regulations over Ninth Circuit precedent, because the
4 result did not contravene the Administrative Procedure Act's requirement that
5 decisions include a statement of "findings and conclusions, and the reasons or basis
6 therefor, on all the material issues of fact, law, or discretion presented on the
7 record." *See, e.g., Jeremiah F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL
8 4071863, at *5 (E.D. Wash. Sept. 7, 2021). Nevertheless, it is not clear that the
9 Court's analysis in this matter would differ in any significant respect under the
10 specific and legitimate standard set forth in *Lester*, 81 F.3d 830-31.

11 The Court notes that Plaintiff mentions Dr. Luci Carstens' opinion but does
12 not set forth an argument with any specificity regarding the ALJ's rejection of Dr.
13 Carstens' opinion. ECF No. at 15 at 14. Thus, any challenge to those findings is
14 waived. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
15 Cir. 2008) (determining Court may decline to address on the merits issues not
16 argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the
17 Court may not consider on appeal issues not "specifically and distinctly argued" in
18 the party's opening brief). As such, the Court has only addressed Plaintiff's
19 challenge to the ALJ's rejection of Dr. Islam-Zwart's opinion.

20

1 On August 18, 2018, Dr. Islam-Zwart, an examining psychologist, rendered
2 an opinion on Plaintiff's functioning. Tr. 329-36. Dr. Islam-Zwart diagnosed
3 Plaintiff with attention deficit hyperactivity disorder, unspecified
4 neurodevelopmental disorder, mild alcohol use disorder, and unspecified
5 communication disorder. Tr. 330, 335. Dr. Islam-Zwart opined Plaintiff has no or
6 mild limitations in her ability to understand, remember, and persist in tasks by
7 following very short and simple instructions and make simple work-related
8 decisions; moderate limitations in her ability to understand, remember, and persist
9 in tasks by following detailed instructions, learn new tasks, perform routine tasks
10 without special supervision, be aware of normal hazards and take appropriate
11 precautions, ask simple questions or request assistance, and set realistic goals and
12 plan independently; marked limitations in her ability to perform activities within a
13 schedule, maintain regular attendance, and be punctual within customary
14 tolerances without special supervision, adapt to changes in a routine work setting,
15 communicate and perform effectively in a work setting, and complete a normal
16 workday/workweek without interruptions from psychologically based symptoms;
17 and severe limitation in her ability to maintain appropriate behavior in a work
18 setting. Tr. 330. Dr. Islam-Zwart further opined Plaintiff's impairments overall
19 have a marked severity, there is indication Plaintiff has difficulty with
20 communication, Plaintiff interacts in an unusual manner and there is a question of

1 autism or cognitive deficits, she “has problems in an appropriate manner,” she
2 “appears unable to work at this time,” and her “prognosis for the future is
3 guarded.” Tr. 330, 336. She stated a referral for Social Security was
4 recommended due to the severity and nature of Plaintiff’s problems. *Id.* The ALJ
5 found Dr. Islam-Zwart’s opinion was somewhat persuasive. Tr. 22.

6 First, the ALJ found Dr. Islam-Zwart’s opinion was inconsistent with her
7 examination findings. *Id.* Supportability is one of the most important factors an
8 ALJ must consider when determining how persuasive a medical opinion is. 20
9 C.F.R. § 416.920c(b)(2). The more relevant objective evidence and supporting
10 explanations that support a medical opinion, the more persuasive the medical
11 opinion is. 20 C.F.R. § 416.920c(c)(1). While Dr. Islam-Zwart opined Plaintiff
12 had several marked and severe limitations, the ALJ noted Plaintiff scored 30 out of
13 30 points on the mini-mental status examination, and her Trail Making Test results
14 were within the normal to only mildly impaired range. Tr. 22 (citing Tr. 335-36).
15 Dr. Islam-Zwart noted Plaintiff was restless with psychomotor agitation, she had a
16 hunched over posture, she had a speech impediment and sometimes left out words,
17 her speech was monotone, slowed, and choppy, she tended to stare, she had a
18 blunted affect, and she interacted in an unusual manner. Tr. 335. However, Dr.
19 Islam-Zwart also noted that Plaintiff’s score of 30 out of 30 points fell above the
20 cutoff of 24 which would indicate an impairment. *Id.* Plaintiff’s Trails A test

1 result was normal, while her Trails B test result was in the mildly impaired range.
2 *Id.* While Plaintiff was able to spell “world” forward and backward, recall three of
3 three objects after a delay, copy a figure and read and obey a command, Tr. 335,
4 Dr. Islam-Zwart opined Plaintiff has moderate limitations in learning new tasks,
5 and understanding, remembering, and persisting in tasks by following detailed
6 instructions, Tr. 330. The ALJ’s finding that Dr. Islam-Zwart’s opinion was
7 inconsistent with her examination results is supported by substantial evidence.

8 Second, the ALJ found Dr. Islam-Zwart’s opinion infringed on an issue
9 reserved to the Commissioner. Tr. 22. A statement on an issue reserved to the
10 Commissioner is a statement made by a medical or nonmedical source, who is not
11 part of the adjudicative team, that would direct the determination or decision that
12 the claimant is or is not disabled or blind within the meaning of the Social Security
13 Act. POMS DI 24503.040. For claims filed on or after March 17, 2017, the
14 adjudicator is not required to articulate how they considered a statement on an
15 issue reserved to the Commissioner. *Id.* Dr. Islam-Zwart opined Plaintiff appears
16 unable to work. Tr. 336. However, such a statement is an issue reserved to the
17 Commissioner, and the Administration has determined such statements are neither
18 valuable nor persuasive. *See* POMS DI 24503.040. As such, the ALJ reasonably
19 rejected the portion of Dr. Islam-Zwart’s opinion that addressed an issue reserved
20 to the Commissioner.

1 Third, the ALJ found Dr. Islam-Zwart did not cite to objective evidence to
2 support her opinion. Tr. 22. Supportability is one of the most important factors an
3 ALJ must consider when determining how persuasive a medical opinion is. 20
4 C.F.R. § 416.920c(b)(2). The more relevant objective evidence and supporting
5 explanations that support a medical opinion, the more persuasive the medical
6 opinion is. 20 C.F.R. § 416.920c(c)(1). Dr. Islam-Zwart opined Plaintiff has
7 several marked and severe limitations and stated there is a question Plaintiff has
8 autism and cognitive deficits, but she did not cite to evidence to support her
9 opinion. Tr. 336. She stated Plaintiff should be referred to Social Security due to
10 the severity and nature of her problems, but again did not cite to evidence to
11 support her opinion. *Id.* Dr. Islam-Zwart did not explain why she believed
12 Plaintiff may have cognitive deficits, nor why she would qualify for Social
13 Security, when her test results were largely normal. *See* Tr. 335-36.

14 Plaintiff argues Dr. Islam-Zwart's opinion is consistent with the counseling
15 records from Northeast Washington Alliance Counseling, ECF No. 15 at 15,
16 however Dr. Islam-Zwart did not document any records she reviewed, nor did she
17 cite to any external evidence to support her opinion, Tr. 329-34. Further, while
18 Plaintiff argues the opinion is consistent with the other evidence, ECF No. 15 at
19 15, the ALJ found Dr. Wiese, Dr. Regets, and Dr. Donohue's opinions were
20 persuasive, all of whom had opinions that were inconsistent with Dr. Islam-Zwart's

1 opinion, Tr. 23. The ALJ's finding that Dr. Islam-Zwart did not cite to objective
2 evidence to support her opinion is supported by substantial evidence. Plaintiff is
3 not entitled to remand on these grounds.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the
ALJ's decision is supported by substantial evidence and free of harmful legal error.
Accordingly, **IT IS HEREBY ORDERED:**

- 8 1. The District Court Executive is directed to substitute Kilolo Kijakazi as

9 Defendant and update the docket sheet.

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

11 3. Defendant's Motion for Summary Judgment, **ECF No. 17**, is

12 | GRANTED.

- 13 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE**.

DATED January 26, 2022.

s/Mary K. Dimke

MARY K. DIMKE

UNITED STATES DISTRICT JUDGE

ORDER - 27